Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari
To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

GEORGE DALY
Counsel of Record for Petitioner

GEORGE DALY, P.A.
Suite 226, 101 North McDowell St.
Charlotte, N.C. 28202
(704) 333-5196

QUESTION PRESENTED

Whether the revocation of petitioner's license to practice law based on an ex parte finding that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law and without allowing her any opportunity to challenge this finding deprived her of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

PARTIES

The Petitioner is Anne M. Lamm. The Respondent is the North Carolina State Bar.

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No_____

In The
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IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari
To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Anne M. Lamm, respectfully prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court entered July 28, 1995.

OPINIONS BELOW

The Order of the Superior Court of Gaston County, North Carolina (App. p.18) was not reported. The opinion of the North Carolina Court of Appeals (App. p. 20) is reported at 116 N.C. App. 382 (1994). The opinion of the North Carolina Supreme Court (App. p.2) is reported at 341 N.C. 196 (1995).

JURISDICTION

The North Carolina Supreme Court entered judgement on July 28, 1995. This is the judgement sought to be reviewed. This Court has jurisdiction to review this judgement pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND BAR RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

Article IV, § 5.i(6) of the Rules of the North Carolina State Bar which was in effect from November 1989 to 1994 provides:

> If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said members of the Positive Action Committee may petition any Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of

time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

STATEMENT OF THE CASE

On Friday, April 30, 1993, Rachel Pickard, a member of the Positive Action for Lawyers Committee of the North Carolina State Bar, submitted to the Honorable Robert W. Kirby, Senior Resident Superior Court Judge for Gaston County, North Carolina, a Petition pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, requesting an entry of an Order suspending Petitioner's license to practice law. After considering the Petition ex parte, the Court entered its Order finding as a fact and concluding as a matter of law that Petitioner was "drinking alcohol and using mood-altering drugs in sufficient amounts to impair her ability to practice law" (App. p.20) and suspending her license to practice law for 180 days or "until such earlier date as this Court shall find that [Petitioner] is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." Id. No

summons was ever issued and Petitioner received no notice of the proceedings until the Petition and Order were served on her the following Monday, May 3, 1993.

On June 11, 1993, Petitioner filed her N.C.R.Civ.P. 60(b)(4)[1] Motion and Motion to Set Aside Order (App. p.26) in which she moved that the Order of Suspension be set aside and she be allowed to Answer and be heard before any action was taken against her. This motion raised the issue that the failure to provide Petitioner with notice or an opportunity to be heard before finally depriving Petitioner of her law license violated the due process clause of the Fourteenth Amendment. (App. p.26). The tendered Answer, (App. p.26), denied that Petitioner was impaired. The Motion was heard in chambers. The Court heard the parties in argument and then denied the Motion without taking any evidence. This action denied Petitioner the right to file Answer and made final the ex parte determination of her unfitness. The Court did not make any ruling on the due process issue. (App. p.20). The Court then, on its own motion, pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, considered whether Petitioner's license should be reinstated. (App. p.20). In its consideration of this matter the Court received testimony but made no findings of historical fact based on this testimony. The Court then

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[1]N.C.R.Civ.P. 60(b)(4) states in pertinent part:

> Relief from Judgement or Order
> ... (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: ...
> (4) The judgement is void.

found that Petitioner was "no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." (Emphasis added). The Court then ordered that Petitioner's license to practice law be reinstated. (App. p.20).

Petitioner appealed to the North Carolina Court of Appeals and raised the issue that the suspension of her law license without any hearing being offered to her violated her rights to due process of law under the Fourteenth Amendment by assignment of error as follows:

> The court erred by entering its Order suspending [Petitioner's] license to practice law and by denying Petitioner's Rule 60(b)(4) Motion and Motion to Set Aside Order because: ...
>
> > 2. The course of proceedings below and Article VI, 5.i(6) of the North Carolina Bar have, by their failure to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, §19 of the North Carolina Constitution.

Record on Appeal to North Carolina Court of Appeals, at p. 28. The North Carolina Court of Appeals affirmed. In Re Lamm, 116 N.C.App. 382 (1994). (App. p.3). It held that suspending respondent's license without notice or an opportunity to be heard did not deprive her of due process because an adequate post-deprivation hearing had been accorded to her. (App. p.3). Judge (now North Carolina Supreme Court Justice)

Orr dissented because the hearing that was given was not a hearing on the deprivation, but rather a hearing on reinstatement. (App.p.14). Petitioner appealed and sought discretionary review in the North Carolina Supreme Court in apt time. Petitioner again raised the due process issue before the North Carolina Supreme Court. (Questions 1 and 2(b) of Petitioner's Notice of Appeal and Petition for Discretionary Review) (App. p.16). The Petitioner moved to dismiss. The petition for discretionary review was granted and the motion to dismiss was denied on February 10, 1995. The North Carolina Supreme Court affirmed the judgement of the North Carolina Court of Appeals per curiam without opinion on July 28, 1995.[2] (App. p.2).

ARGUMENT

THE REVOCATION OF PETITIONER'S LICENSE TO PRACTICE LAW BASED ON AN EX PARTE FINDING THAT SHE WAS USING ALCOHOL AND MOOD ALTERING DRUGS IN SUFFICIENT AMOUNTS TO IMPAIR HER ABILITY TO PRACTICE LAW WITHOUT ALLOWING HER ANY OPPORTUNITY TO CHALLENGE THIS FINDING DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIO-

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[2]Respondent first raised issue before the North Carolina Supreme Court, that the case was moot because the petitioner's law license was reinstated and the State Bar rule had been changed so that ex parte suspension are now only possible in situations akin to those in which temporary restraining orders can be issued in civil cases. (A copy of the new Rule appears at App.p.31). However, because petitioner is faced with potential collateral legal consequences the case is not moot. Sibron v. New York, 392 U.S. 40, 20 L.Ed.2d 917 (1968). The North Carolina Supreme Court decided the case on its merits.

LATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The North Carolina State Bar Rule did not provide, and the Superior Court did not interpret the Rule to allow, any process by which Petitioner could challenge the Court's initial ex parte determination that her ability to practice law was impaired. Petitioner has never had any opportunity to challenge the determination that on April 30, 1993, her ability to practice law was impaired.

Whether Petitioner's law license is a "property" for Fourteenth Amendment purposes is to be determined by State law. Bishop v. Wood, 426 U.S. 341, 344-45, 48 L.Ed.2d 684 (1976). A law license is a property right under North Carolina law. In Re Burton, 257 N.C. 534, 543, 126 S.E.2d 581 (1962). There has, therefore, been a deprivation of property here.

As to what process is then due, some process is due once a State infringes a property interest. The Superior Court refused to allow Petitioner to file an Answer and declined to take evidence as to whether its ex parte Order was based in fact. This total lack of process to challenge the initial suspension of her license violated the due process clause because its affected a property interest without there being any process at all. In Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 (1975), students were suspended from high school for ten days without being granted any hearing at all. The Court held that some process was required even for this level of governmental action, since it was more than de minimis. Id., at 576. The deprivation visited upon Petitioner is more onerous than a ten-

day suspension from school and obviously not de minimis.

Granting process is not an empty formula, but is vital to the truth-finding function of courts.

> "No better instrument has been derived for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

Joint Anti-Fascist Committee v. McGrath, 431 U.S. 123, 170, 171-72, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

The Court in Goss v. Lopez said that process was needed because "things are not always as they seem to be." 419 U.S. at 584. So it is in the present case. Petitioner denied that there were good grounds to suspend her law license. (App. p.29). Fundamental fairness required that she have an opportunity to present her case before her license was suspended. In Re Lamm, 116 N.C. App. 382 (1994) (Orr, J., dissenting); Randall v. Brigham, 7 Wall. 523, 540, 19 L.Ed. 285, 293 (1869) (Justice Field) ("When not taken from matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense") (emphasis added); In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968) (due process requires prior notice and an opportunity to explain and defend against charges of attorney misconduct).

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the challenged decision of the North Carolina Supreme Court.

Respectfully submitted, this 26 day of October, 1995.

George Daly
GEORGE DALY, P.A.
101 North McDowell Street, Suite 226
Charlotte, North Carolina 28204
N.C. Bar License No. 1071
Telephone: (704) 333-5196
FAX: (704) 333-4465
Attorney for Petitioner

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IN THE SUPREME COURT OF NORTH CAROLINA

IN RE: ANNE M. LAMM,	)
	)
No. 539A94 - Gaston	)
Respondent	)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 382, 448 S.E.2d 125 (1994), affirming an order entered by Kirby, J., on 17 June 1993 in Superior Court, Gaston County. On 9 February 1995, this Court allowed discretionary review of additional issues. Heard in the Supreme Court June 1995.

Carolin Bakewell for petitioner-appellee the North Carolina State Bar.

George Daly, P.A., by George Daly, for respondent-appellant.

PER CURIAM.

AFFIRMED.

Justices WEBB and ORR did not participate in the consideration or decision of this case.

No: 9327SC951 TWENTY-SEVENTH A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE: ANNE M. LAMM,)
)
Respondent)
From Gaston County)
(No Superior Court Docket)
Number was assigned))

****

MARTIN, Judge.

The Positive Action for Lawyers Committee of the North Carolina State Bar was created in 1979 pursuant to an amendment to Article VI, Section 5.i. of the Rules, Regulations and Certificate of Organization of the North Carolina State Bar ("State Bar Rules") "for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct...." See 302 N.C. 637 (1979). In 1989, Article VI, Section 5.i. was amended to add a new subsection (6) as follows, in pertinent part:

> (6) If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence

of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

See 325 N.C. 750 (1989).

On 30 April 1992, two members of the Positive Action for Lawyers Committee ("PALS Committee"), Rachel Pickard and Robert L. Bradley, filed a verified petition pursuant to Article VI, Section 5.i.(6) requesting entry of an order suspending the law license of respondent on the ground that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law. In support of the petition, Pickard filed her own affidavit and the affidavit of the Clerk of

Superior Court for Gaston County. The petition also recited that the Executive Director of the State Bar and the Director of the PALS Committee concurred in petitioner's opinion. After considering the petition and affidavits in an ex parte hearing without notice to respondent or any opportunity for her to be heard, Judge Robert Kirby, Resident Superior Court Judge of Gaston County, entered an order the same day suspending respondent's license to practice law for 180 days "or until such earlier date as this Court shall find that [respondent] is no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law." Respondent was served with a copy of the affidavits and order on 3 May 1993. On 11 June 1993, respondent filed a motion requesting that the proceeding against her be declared void and be expunged and, alternatively, that the 30 April 1993 order be set aside and that she be allowed to file an answer and be heard before action was taken against her. After a hearing, Judge Kirby denied respondent's motions, but proceeded to hear evidence and determined that respondent had entered into a contract for treatment and was no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law. Judge Kirby ordered, pursuant to Article VI, Section 5.i.(6), that respondent's license be reinstated. Respondent appealed.

****

Respondent contends that the proceeding pursuant to Article VI, Section 5.i.(6) of the State Bar Rules, suspending her license to practice law without providing her with

presuspension notice or opportunity to be heard, deprived her of her right to due process under the Fourteenth Amendment to the United States Constitution and under Article I, § 19 of the North Carolina Constitution. "The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law." State v. McCleary, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), affirmed, 311 N.C. 397, 316 S.E.2d 870 (1984). Article I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the federal Constitution. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); McNeil v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990), and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive is construing the former. Watch Co. v. Brand Distributors, 285 N.C. 467, 206 S.E.2d 141 (1974). However, in deciding what procedural safeguards are due under Article I, § 19 of the North Carolina Constitution, the North Carolina Supreme Court has employed a somewhat different method of decision than that employed by the United States Supreme Court for deciding similar questions under the due process clause of the federal constitution. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986). Accordingly we must examine the procedures prescribed by the State Bar Rule at issue, and particularly as applied to respondent in this case, to determine whether they comport with the requirement of due process under both

constitutions.

The parties agree that respondent's license to practice law constitutes a property interest which cannot be taken away without due process of law. See Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365 (1979); In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962). However, the parties disagree as to the requirement of due process in this situation. Respondent contends that due process required that she receive notice and opportunity to be heard prior to the entry of the 30 April 1993 order suspending her law license. The North Carolina State Bar contends that both Article VI, § 5.i.(6), and due process permit the order to be entered ex parte and provide the respondent with a sufficient immediate post deprivation remedy. We agree with the State Bar and affirm the order of the trial court.

Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual. Baugh v. Woodard, 604 F. Supp. 1529 (E.D.N.C. 1985), affirmed in part, vacated in part, 808 F.2d 333 (4th Cir. 1987); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976). Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved. Wilson v. Swing, 463 F.Supp. 555 (M.D.N.C. 1978); Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (W.D.N.C. 1974). In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the gov-

ernmental entity seeking a remedy. Town of Hudson v. Martin-Kahill Ford, 54 N.C. App. 272, 283 S.E.2d 417 (1981), disc. review denied, 304 N.C. 733, 288 S.E.2d 804 (1982). "[E]ntitlement to a hearing does not automatically flow from a finding that procedural due process is applicable." Bowens v. Board of Law Examiners, 57 N.C. App. 78, 83, 291 S.E.2d 170, 173 (1982) quoting Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 49 L.Ed.2d 393 (1976). (Due process afforded by opportunity for failing bar applicants to be reexamined.) At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard. Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015 (4th Cir. 1983).

Where a predeprivation hearing is impractical and a post-deprivation hearing is meaningful, a State satisfies its due process obligation by providing the latter. Giglio v. Dunn, 732 F.2d 1133 (2d Cir. 1984), cert. denied, 469 U.S. 932, 83 L.Ed.2d 265 (1984); See Waltz v. Herlihy, 682 F.Supp. 501 (S.D.Ala. 1988), affirmed, 871 F.2d 123 (11th Cir. 1989). (Denial of presuspension hearing pursuant to statutes authorizing suspension of license to practice medicine because of dispensing controlled substances other than for legitimate medical purpose and because of inability to practice medicine with reasonable skill and safety due to use of chemicals did not constitute denial of due process.) Where the State has an important interest to protect and probable cause to believe that plaintiff poses a real and imme-

diate danger to that interest, interim or temporary emergency deprivation of a property right pending a prompt judicial or administrative hearing is constitutional. Barry v. Barchi, supra; Gershenfeld v. Justices of the Supreme Court of Pa., 641 F.Supp. 1419 (E.D.Pa. 1986).

The United States Supreme Court has established a three-factor balancing test to resolve the due process issue in this context:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe-guards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 53 (1976). Thus, we must first weigh the private interest affected by the challenged action. In this case, the private interest affected is respondent's interest in continued possession and use of her law license pending the outcome of a postsuspension hearing. The State Bar agrees that this is a substantial interest, and we recognize that any hardship suffered during delay between erroneous deprivation and postsuspension restoration cannot be undone. See Henry v. Edmisten, supra. Factors bearing on the weight of respondent's interest in continuous use of her

law license include the maximum revocation period and the timeliness of postsuspension review. Id.

Under Article VI, § 5.i.(6), these factors operate conjunctively. Although the maximum revocation period is 180 days, the rule provides for an abbreviated period depending upon the actions of the suspended attorney. The rule provides for reinstatement of the license as soon as the suspended attorney demonstrates that he or she is no longer drinking alcohol or using mood-altering drugs in a length of the revocation period is ostensibly within the immediate control of the suspended attorney.

Similarly, the rule provides for prompt postsuspension review, which may occur at any time upon petition of the suspended attorney. In this case, although respondent waited over a month to file her motions, the motions were heard and ruled upon within six days of filing. The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. See Mackey v. Montrym, 443 U.S. 1, 61 L.Ed.2d 321 (1979); Henry, supra.

Second, the balancing test requires us to weigh the risk of erroneous deprivation of respondent's private interest as a result of the procedures used and the probably value of additional procedural safeguards. However:

> Due process does not mean that governmental decision making must comply with standards that assure error-free determinations... When... prompt post deprivation review is available, what is generally required

> is no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for determining that the facts justifying the official action are as a responsible government official warrants them to be.

Henry, 315 N.C. at 484, 340 S.E.2d at 727-8. We believe that the predeprivation procedure set forth in Article VI, Section 5.i.(6) provides a reasonably reliable basis for determining that the facts justifying suspension are as alleged by the petitioning PALS members. The rule requires that at least two members of the PALS Committee have the opinion that a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his ability to practice law. This opinion must be concurred in by **either** the Chairman or Director of PALS **and** the Executive Director of the North Carolina State Bar. Additionally, the rule requires that the affidavit of at least two persons attesting to such impairment must accompany the petition. The petition and affidavits are then reviewed by a superior court judge who makes the final determination as to whether the facts require suspension of the lawyer's license to practice law.

Finally, we must weigh the State's interest served by the summary suspension procedure. The proceeding prescribed by Article VI, Section 5.i.(6) promotes the State's compelling interest in preventing an impaired lawyer from engaging in conduct detrimental to the public, the courts, or the legal profession. See State Bar Rules, Article VI, Section 5.i.(4). The summary and automatic character of the suspension is

reasonably related to the purpose of the rule, i.e., to protect the public from lawyers whose ability to practice has been impaired by substance abuse. Presuspension hearings requiring notice and opportunity to be heard would encourage dilatory tactics on the part of impaired lawyers to try to maintain their privilege to license, frustrating the purpose of the rule and creating a further risk of damage to his or her clients and the proper administration of justice.

A recitation here of the evidence presented to Judge Kirby in the preset case would serve no useful purpose, although we must review it to insure that appellant's rights were not violated by the rule as it was applied to her. It is sufficient to say that the evidence was substantial and is strikingly illustrative of the need for providing the State Bar's PALS program with an ability to move quickly to carry out the purposes of the rule.

In Henry v. Edmisten, supra, our North Carolina Supreme Court expressed dissatisfaction with the use of the "balancing test" to determine what due process is required under the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution. Id. at 490, 340 S.E.2d at 731. The Court promulgated the following principle as to the minimal requirements of due process required by the Law of the Land Clause:

> When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordi-

> narily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

Id. at 494, 340 S.E.2d at 733. As we have discussed, after it has been demonstrated that an attorney is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, the State has a legitimate interest in prompt remedial action to prevent the present and future danger which such person poses to the proper operation of our legal system and those who rely upon it. The State Bar PALS procedure, as contained in the rule, provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension. This procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution.

We note with approval that the Council of the North Carolina State Bar has, apparently as a result of the concerns raised by appellant in this case, proposed that Article VI, Section 5.i. of the State Bar Rules be revised to provide for presuspension notice and hearing except in emergency circumstances. See The North Carolina State Bar Newsletter, Vol. 19, No. 3, p.9. While we hold that the procedures prescribed by the current rule, and employed in this case, meet the minimal requirements of due process under our State and federal constitutions, we commend the State Bar for providing increased

safeguards for the rights of attorneys while continuing its efforts to protect the public from, and provide assistance to, practitioners impaired by alcoholism or other substance addictive illness.

In summary, the application of Article VI, Section 5.i(6) of the Rules of the North Carolina State Bar to the facts before us does not violate respondent's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of Article I, § 19 of the North Carolina State Constitution.

Affirmed.

Judge COZORT concurs.

Judge ORR concurs in part, and dissents in part.

Judge ORR concurring in part and dissenting in part.

While I do not disagree with the analysis employed by the majority as it applies to the issues dealing with pre-deprivation hearings and a meaningful post-deprivation hearing, I find the Rule at issue in this case constitutionally infirm in one respect. Although there is a post-deprivation process by which an attorney can have his or her license reinstated, there is no provision or procedure to determine if the initial unilateral action of suspension was in fact appropriate. A post-deprivation hearing that merely reinstates a suspended license, upon a finding that at the time of the hearing the attorney involved is not impaired, provides no meaningful opportunity to contest the results of the original process and the resulting sus-

pension. There should at a minimum be an opportunity for the affected party to challenge the initial action and the resulting suspension. For this reason, I concur in part and dissent in part.

No. 539A94 TWENTY-SEVENTH A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

IN RE: ANNE M. LAMM
From Gaston

****

NOTICE OF APPEAL
and
PETITION FOR DISCRETIONARY REVIEW
AS TO ADDITIONAL ISSUES
(Filed 25 October 1994)
(Allowed 9 February 1995)
and
MOTION TO DISMISS
(Filed 2 November 1994)
(Denied 9 February 1995)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Anne M. Lamm, Respondent-Appellant-Petitioner ("Appellant"), hereby appeals to the Supreme Court of North Carolina from the Judgment of the Court of Appeals of North Carolina, entered September 20, 1994 (copy attached).

This Judgment affirmed a decision of the Superior Court of Gaston County which had, on Petition of the Positive Action for Lawyers Committee of the North Carolina State Bar, ex parte found as a fact and concluded as a matter of law that Appellant was "drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law" (R p 10) and suspended her license to practice law. Id. On later Motion of Appellant (R p 12) the Superior Court refused to set this Order aside and refused to allow Appellant to file Answer and be heard on the merits of the Petition against her. (R p 19). On appeal the North Carolina Court of Appeals affirmed. Judge Robert F. Orr dissented based on the following issue:

> Question No. 1: Whether, in a proceeding pursuant to Article VI, § 5i(6) of the Rules, Regulations and Organization of the North Carolina State Bar, wherein the Superior Court ex parte upon the petition of the Positive Action for Lawyers Committee of the North Carolina State Bar found as a fact and concluded as a matter of law that Appellant was drinking alcohol and using mood-altering drugs in sufficient quantities to impair her ability to practice law and thereupon suspended

Appellant's license to practice law, the Superior Court erred and deprived Appellant of due process of law under Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution by denying Appellant's motion that its Order be set aside and she be allowed to file Answer and otherwise contest this matter on the merits, thereby depriving her of all opportunity to challenge her suspension from law practice.

Further, Appellant hereby appeals to the Supreme Court of North Carolina from this said Judgment of the Court of Appeals of North Carolina, which Judgment directly involves substantial questions arising under the Constitutions of the United States and the State of North Carolina, as follows:

Question No. 2: Whether (a) the Court of Appeals erred by deciding a constitutional issue that was not presented, namely be deciding whether a hearing after the fact of deprivation of Appellant's right to practice law was sufficient process when the hearing that was in fact held was not a post-deprivation hearing but was a hearing on reinstatement of Appellant's license; and (b) alternatively, whether the Court of Appeals erred in determining that Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution did not require that Appellant be given notice and an opportunity to be heard before the

Superior Court determined that she was unfit to practice law and suspended her license.

Question No. 3: Whether the Court of Appeals violated the Supremacy Clause of the United States Constitution, Article VI, cl. 2, by failing to apply In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968), in which the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires no tice and an opportunity to be heard before an attorney may be disbarred.

Question No. 4: Whether the Court of Appeals failed to follow the decision of this Court in In Re Burton, 257 N.C. 534, 544 (1962), which held that due process of law requires that a proceeding by a Court to investigate alleged misconduct of an attorney must be initiated by a rule or order to show cause granting a reasonable time for answer and preparation of defense and then allowing full opportunity to be heard before judgement is rendered.

In the event that the Court finds these constitutional issues to be substantial, they are the issues which Appellant intends to present for review in her Brief, together with Question No. 1. These questions were each raised in the Superior Court by the Rule 60(b)(4) Motion and Motion to Set Aside Order (R p 12), which specifically claimed that the suspension of Appellant's license without prior opportunity to be heard violated both the State and Federal Constitutions, and by appropriate exceptions and assignments of error in the Record of Appeal.

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STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	ORDER
	)	
Respondent.	)	
(Filed Under Seal)_____	)	

This matter is before the Court on the Rule 60(b)(4) Motion and Motion to Set Aside Order ("the Motion"), filed June 11, 1993.

1. This is an action brought pursuant to Article VI, § 5i(6) of the Rules of the North Carolina State Bar ("the Rule"). This action was commenced on April 30, 1993, by the filing of a Verified Petition praying that Respondent's license to practice law be temporarily suspended pursuant to the Rule, and for other relief. The matter was heard ex parte that same day by the undersigned Judge Presiding, without notice to Respondent or any opportunity for her to be heard, as provided by Article VI, § 5i(6) of the Rules of the North Carolina State Bar. The Court, based upon the Petition and the Affidavits of Rachel Pickard and Betty B. Jenkins, Clerk of Superior Court of Gaston County, entered its Order of record, providing that

Respondent's license to practice law in the State of North Carolina was suspended for 180 days from the date of the Order, or until such earlier date as this Court should find that Respondent was no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law. A copy of this Order, of the Petition, and of the Affidavits was served on Respondent on or about May 3, 1993, by personal delivery to her from Petitioner Robert L. Bradley. The Respondent's Motion was filed on June 11, 1993, and heard that same day. Petitioners were represented at the hearing by Carolin Bakewell, Counsel for the North Carolina State Bar. Respondent was represented at the hearing by George Daly of the Charlotte, North Carolina Bar. Respondent and Attorney Edward Murrelle, Director of the North Carolina State Bar Positive Action for Lawyers Committee ("PALS Committee") were present at the hearing. Respondent's counsel had advised the State Bar on Monday, June 7, 1993, of Respondent's intention to file the Motion, and counsel and the Court conferred in a telephone conference call on the next day to schedule the hearing. The Motion was provided to the Court and counsel by facsimile transmission on Thursday, June 10, 1993. Petitioners have waived any further notice of motion to which they might be entitled.

2. At the hearing Respondent first brought on her Motion. After hearing the parties in argument, the Court denied the Motion. Respondent excepted.

3. The Court then considered whether, pursuant to the Rule, Respondent was "no longer drinking alcohol or us-

ing mood-altering drugs in sufficient amounts to impair his or her ability to practice law." In its consideration of this matter, the Court received testimony as follows:

(a) Respondent testified:

(i) that she had been a licensed attorney since 1969;

(ii) that she had no notice or opportunity to be heard before the Order herein was entered;

(iii) that she was presently an alcoholic;

(iv) that she was not presently addicted to mind-altering drugs, and has never been so;

(v) that she had not imbibed alcoholic beverages since April 25, 1993;

(vi) that she was taking, pursuant to prescription from a medical doctor, the drug sinequan, which was "mind-altering" in that it tends to suppress her mood swings;

(vii) that on May 23, 1993, she had voluntarily presented herself to The Life Center of Galax, Virginia, an alcoholic rehabilitation center, and had successfully completed its two-week program;

(viii) that she was currently attending the Dilworth Center for Chemical Dependency, in Charlotte, North Carolina and attending Alcoholics Anonymous meetings on a regular basis as advised by the Dilworth Center;

(ix) that since April 25, 1993, her memory, her presence of mind, and her ability to get along with people had substantially improved; and

(x) that in her opinion, from and after April 25, 1993, she was competent and capable of practicing law.

(b) The State Bar presented the testimony contained in the Affidavits of Rachel Pickard and Betty B. Jenkins, to which Respondent waived any objection as to hearsay or other objections, except that Respondent presented testimony (pertaining to Paragraph 2 of the Jenkins Affidavit) that Mr. Fletcher had not made the statement regarding Respondent's condition which is attributed to him in that Paragraph.

(c) Edward Murrelle testified for the State Bar:

(i) that he is a licensed North Carolina attorney in good standing and has been licensed to practice in this state since 1964;

(ii) that he has been the Director of the PALS Committee since 1988;

(iii) that he has attended four week-long workshops sponsored by the American Bar Association Impaired Lawyer Commission since 1988;

(iv) that he has been a trustee of the Blue Ridge Alcoholics Anonymous Retreat since 1986;

(v) that he represents Fellowship Hall, a treatment center for individuals suffering from substance abuse and addiction;

(vi) that he has worked with approximately 85 individuals suffering from alcoholism since becoming involved with the PALS Committee program;

(vii) that based upon his training and experience, it is his opinion that alcoholism is a chronic, progressive disease in which relapse is prevalent unless an ongoing treatment program is utilized;

(viii) that based upon his training and experience, attending an in-house treatment program is only the first step in recovering from alcoholism and that it is crucial that the patient continue follow up treatment, such as regularly attending Alcoholics Anonymous;

(ix) that before the PALS Committee sought an order suspending Lamm's license to practice law in April 1993, numerous attempts were made by PALS Committee volunteers over a period of approximately two years to persuade her to seek treatment for her alcoholism; and

(x) that the PALS Committee sought the order suspending Lamm's license to practice law only after Lamm rejected attempts by PALS Committee representatives to persuade her to seek treatment for her alcoholism and it appeared that her condition was worsening.

(d) Respondent testified on cross-examination:

(i) that she was charged with a third offense of driving while impaired on or about April 25, 1993; and

(ii) that she was voluntarily entered the detoxification unit of Mercy Hospital in Charlotte, North Carolina for treatment of alcoholism from April 26 to April 30, 1993.

The Court is informed that Lamm and the PALS Committee have entered into a contract for treatment.

Based upon the foregoing testimony, the Court finds as a fact that Respondent is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law.

The Court thereupon concludes as a matter of law that:

1. Respondent's Motion should be denied; and

2. Respondent having entered a Contract for treatment, Respondent's license to practice law should be reinstated.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the license of Respondent Anne M. Lamm to practice law in the State of North Carolina shall be, and the same hereby is, **REINSTATED.**

The parties have consented that this Order may be entered out of County and out of term.

This 17 day of June, 1993.

/s/ Hon. Robert W. Kirby
Robert W. Kirby
Senior Resident Superior Court Judge for Gaston County

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	RULE 60(b)(4) MOTION
	)	and
Respondent.	)	MOTION TO SET ASIDE
	)	ORDER
_____	)	

(Filed Under Seal)

NOW COMES ANNE M. LAMM and respectfully shows:

1. On April 30, 1993, the attached Petition was filed. Upon information and belief no summons issued.

2. On April 30, 1993 the attached Order was entered.

3. On May 3 or May 4, 1993, Respondent received a copy of the Petition and Order and Affidavits by personal delivery from Robert Bradley. Previously she had no knowledge of either document. She has never been served with process in this action.

4. Prior to the institution of this action Respondent was a licensed North Carolina attorney in good standing.

5. Article VI, § 5i(6) of the Rules of the North Carolina State Bar, pursuant to which this proceeding is brought, is vague and overbroad and substantively arbitrary, in violation of Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

6. The course of proceeding herein and Article VI, § 5i(6) of the Rules of the North Carolina State Bar have, by their failure to give Respondent notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

WHEREFORE, Respondent respectfully moves, pursuant to N.C.R.Civ.P. 60(b)(4) and the inherent power of the Court:

1. that this proceeding be declared void, and be expunged; and

2. that, alternatively, the Order herein be set aside, and Respondent be allowed to Answer (in the form attached), and be appropriately heard before any action be taken against her.

Respectfully submitted, this 11 day of June, 1993.

George Daly
GEORGE DALY, P.A.
101 North McDowell Street, Suite 226
Charlotte, North Carolina 28204
N.C. Bar License No. 1071
Telephone: (704) 333-5196
FAX: (704) 333-4465

Attorney for Petitioner

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON. File No._____

IN RE ANNE M. LAMM,)
)
Respondent.) ANSWER TO PETITION
)
)
_____)

NOW COMES Respondent and, answering the Petition herein, respectfully says:

FIRST DEFENSE

Answering the numbered allegations of the Petition:

1. Admitted.
2. Denied.
3. Admitted.
4. It is not denied that the named persons have the opinion that they profess, but it is denied that Respondent is drinking alcohol or using mood altering drugs in any amount (except that Respondent is taking medically prescribed medications in the prescribed dosages) and it is denied that her ability to practice law is impaired.

5. Denied.

6. Denied.

SECOND DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated the Fourteenth Amendment to the United States Constitution.

THIRD DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated Article I, § 19 of the North Carolina Constitution.

FOURTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(1) for lack of jurisdiction over the subject matter.

FIFTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(2) for lack of jurisdiction over the person.

SIXTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(4) for insufficiency of process.

SEVENTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(5) for insufficiency of service of process.

EIGHTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

NINTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is unconstitutionally vague and overbroad in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

TENTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, § 19 of the North Carolina Constitution.

ELEVENTH DEFENSE

Article VI, § 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in not requiring that Respondent's ability to practice law be actually impaired before her license to practice law may be suspended or inactivated.

WHEREFORE, Petitioner respectfully prays that this proceeding be declared void, and be expunged, and that she recover her costs and have such other and further relief as is merited in the premises.

Respectfully submitted, this 11 day of June, 1993.

George Daly
GEORGE DALY, P.A.
101 North McDowell Street, Suite 226
Charlotte, North Carolina 28204
N.C. Bar License No. 1071
Telephone: (704) 333-5196
FAX: (704) 333-4465

Attorney for Petitioner

.0606 Suspension for Impairment, Reinstatement

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the executive director of the committee and the executive director of the North Carolina State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent, and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being

treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless:

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.